

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 9, 2007 appellant, then a 45-year-old tax compliance officer, filed an occupational disease claim alleging that on April 11, 2007 he first realized that his allergic reaction to the handling of paper and ink was employment related. OWCP accepted the claim for aggravated atopic dermatitis and aggravated allergic rhinitis due to other allergens, which was expanded to include aggravation of psoriasis. Appellant stopped work on September 10, 2007 and has not returned.

In a November 2, 2009 work capacity evaluation form, Dr. Tidence L. Prince, an attending physician Board-certified in allergy and immunology, indicated that appellant was capable of working an eight-hour day with restrictions. He noted that appellant was capable of working with a computer but could not come into contact with paper as part of his job duties.

On November 10, 2009 OWCP referred appellant for vocational rehabilitation services.

On September 7, 2010 a vocational rehabilitation counselor issued a report summarizing her efforts to find vocational training or suitable alternate employment for appellant within his physical restrictions. The vocational counselor recommended five positions listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT), one of which, a telephone solicitor, DOT #299.357.014, was within appellant's restrictions and reasonably reflected his ability to earn wages. She found that he had the education, skills and training to qualify for job openings in this occupation and his treating physician had approved these positions.

On November 19, 2010 OWCP issued a notice proposing to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and had the capacity to earn wages as a telephone solicitor, DOT #299.357.014, at the rate of \$323.60 per week, in accordance with the factors outlined at 5 U.S.C. § 8115.² The position was based on his work experience, education, medical restrictions and labor market survey. OWCP gave appellant 30 days to submit evidence if he disagreed with this finding.

By decision dated February 1, 2011, OWCP reduced appellant's wage-loss compensation effective February 13, 2011 based on its finding that the position of telephone solicitor reasonably represented his wage-earning capacity.

In a letter dated February 7, 2011, appellant's counsel requested a telephonic hearing before an OWCP hearing representative, which was held on May 10, 2011. At the hearing, he argued that the selected position was inappropriate as the salary was based on commissions.

By decision dated July 22, 2011, an OWCP hearing representative affirmed the February 1, 2011 decision. She found no evidence that the salary for the position was based on commissions.

² 5 U.S.C. § 8115.

By letter dated September 28, 2011, counsel requested reconsideration. He provided a copy of the Board's decision in *M.V.*, Docket 10-1642 contending that the July 22, 2011 OWCP decision should be reversed.

By decision dated May 4, 2012, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require it to review its prior decision. It stated that, while counsel submitted a decision by the Board, he did not present any argument based on that decision in his reconsideration request. Thus, the request did not constitute relevant evidence or warrant a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

In the present case, the Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor did he submit any pertinent and new medical evidence not previously considered by OWCP.

In support of his request for reconsideration, appellant's representative submitted a copy of the Board's decision in *M.V.*, Docket No. 10-1642 (issued June 15, 2011). He did not articulate any reason how the *M.V.* decision was applicable to his case. Appellant did not set

³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁴ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁵ 20 C.F.R. § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁶ 20 C.F.R. § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

forth any argument as to why OWCP erroneously applied or interpreted a specific point of law, nor did appellant set forth a relevant legal argument not previously considered by OWCP.⁷

The Board has held that, while reopening of a case may be predicated on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.⁸ OWCP found that appellant did not present any argument based on the Board decision he referenced in the reconsideration request. Therefore the argument proffered by him has no reasonable color of validity and does not serve as a basis for merit review. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.⁹

The Board also notes that appellant has not submitted any new medical evidence which addresses the relevant issue of whether OWCP's February 1, 2011 decision reducing his compensation was proper.

In view of the foregoing, the Board finds that OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

⁷ See also *C.H.*, Docket No. 12-795 (issued August 21, 2012); *Emmit Taylor*, Docket No. 03-1178 (issued July 21, 2004). A request for modification of a wage-earning capacity determination must be distinguished from a request for reconsideration of a prior decision. It is a request for additional compensation. A request for modification of a wage-earning capacity determination which is supported by new and relevant evidence requires a merit review and is not subject to a time limitation.

⁸ *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *L.H.*, 59 ECAB 253 (2007); *Elaine M. Borghini*, 57 ECAB 549 (2006); *Cleopatra McDougal-Saddler*, 50 ECAB 367 (1999).

⁹ See *S.J.*, *supra* note 5; *D'Wayne Avila*, 57 ECAB 642 (2006); *David J. McDonald*, 50 ECAB 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2012 is affirmed.

Issued: November 28, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board